IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

WINDWAY TECHNOLOGIES, INC., WELCH MOTELS, INC., GREGORY SWECKER, and BEVERLY SWECKER, Plaintiffs, vs. MIDLAND POWER COOPERATIVE, and IOWA LAKES ELECTRIC COOPERATIVE, Defendants.	No. C00-3089MWB **MEMORANDUM OPINION AND ORDER REGARDING DEFENDANT MIDLAND POWER'S MOTION TO DISMISS FOR LACK OF JURISDICTION**

I. INTRODUCTION

The plaintiffs, Windway Technologies, Inc. ("Windway"), Welch Motels, Inc. ("Welch"), Gregory Swecker and Beverly Swecker ("Sweckers"), bring this claim against Midland Power Cooperative ("Midland") and Iowa Lakes Electric Cooperative ("Iowa Lakes"), alleging that the tariffs imposed by defendants violate the Public Utility Regulatory Policies Act of 1978 ("PURPA") and regulations implementing this statute, to wit: 18 C.F.R. § § 292.304, 292.305, and 292.306. Midland moves to dismiss the complaint on the ground that the court lacks subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1).[1] Specifically, Midland contends that: (1) the plaintiffs' claims,

[1]Midland requested a hearing on this motion, however, the attorney for Midland couched this request in the following manner: "the undersigned states that he would be available for oral argument on this motion, if the court requests same". The court does not find that a hearing on this motion would be beneficial, and, therefore, to the extent that Midland requests a hearing on this motion, its request is denied.

which cite PURPA, are not claims that arise under federal law for jurisdictional purposes and, therefore, must be brought in state court because state court has exclusive jurisdiction to enforce any requirement of a non-regulated utility's PURPA implementation plan; and (2) the plaintiffs' remaining claims are traditional state law tort claims and do not turn on federal law, and the PURPA would not preempt application of state law on those claims.[2] In response, plaintiffs assert that this court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 16 U.S.C. § 824a-3(h)(2)(B).

II. LEGAL ANALYSIS

A. Rule 12(b)(1) Challenges To Jurisdiction

For the court to dismiss for lack of subject matter jurisdiction under FED. R. CIV. P.. 12(b)(1), the complaint must be successfully challenged on its face or on the factual truthfulness of its averments. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). The court in *Titus* distinguished between the two kinds of challenges:

> In a facial challenge to jurisdiction, all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction. *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 731-32 (11th Cir. 1982). . . .
> If the [defendant] wants to make a factual attack on the jurisdictional allegations of the complaint, the court may

[2]Defendant Iowa Lakes Electric Cooperative ("Iowa Lakes") filed its answer on the same date that Midland filed its Motion to Dismiss. In its answer, Iowa Lakes claims that this court lacks subject matter jurisdiction, asserting virtually the same reasons that Midland asserts in support of its Motion to Dismiss. Although Iowa Lakes did not have to join in the arguments asserted by Midland in its Motion to Dismiss, *see* Rule FED. R. CIV. P.. 12(b), the court does not understand its reasoning for not subsequently joining in the motion. Notwithstanding, the court concludes that the same analysis applied to Midland applies with equal force to Iowa Lakes.

> receive competent evidence such as affidavits, deposition testimony, and the like in order to determine the factual dispute. *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) [footnote omitted]. The proper course is for the defendant to request an evidentiary hearing on the issue. *Osborn* [*v. United States*], 918 F.2d [724,] 730 (citing *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986)).

Id.

In *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990), the Eighth Circuit Court of Appeals presented its most exhaustive discussion of the procedures and requirements for determination of a 12(b)(1) motion to dismiss.

> The district court was correct in recognizing the critical differences between Rule 12(b)(1), which governs challenges to subject matter jurisdiction, and Rule 56, which governs summary judgment. Rule 12 requires that Rule 56 standards be applied to motions to dismiss for failure to state a claim under Rule 12(b)(6) when the court considers matters outside the pleadings. [Citations omitted.] Rule 12 does not prescribe, however, summary judgment treatment for challenges under 12(b)(1) to subject matter jurisdiction where a factual record is developed. Nonetheless, some courts have held that Rule 56 governs a 12(b)(1) motion when the court looks beyond the complaint. We agree, however, with the majority of circuits that have held to the contrary. . . . [Citations omitted.]
>
> The reason for treating a 12(b)(1) motion differently than a 12(b)(6) motion, which is governed by Rule 56 when matters outside the pleadings are considered, "is rooted in the unique nature of the jurisdictional question." *Williamson* [*v. Tucker*], 645 F.2d [404,] 413 [(5th Cir.), *cert. denied*, 454 U.S. 897 (1981)]. It is "elementary," the Fourth [sic] Circuit stated, that a district court has "broader power to decide its own right to hear the case than it has when the merits of the case are reached." *Id.* Jurisdictional issues, whether they involve questions of law or of fact, are for the court to decide. *Id.* Moreover, because jurisdiction is a threshold question, judicial

> economy demands that the issue be decided at the outset rather than deferring it until trial, as would occur with denial of a summary judgment motion.

Osborn, 918 F.2d at 729.

The court in *Osborn* found the distinction between facial and factual attacks on the complaint under 12(b)(1) to be critical. *Id.* (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.), *cert. denied,* 449 U.S. 953 (1980), and *Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3d Cir. 1977)). The court stated that

> [i]n the first instance, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6). The general rule is that a complaint should not be dismissed "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards.

Id. at 729 n. 6 (citations omitted). A factual challenge to jurisdiction under 12(b)(1) is unique:

> [H]ere the trial court may proceed as it never could under 12(b)(6) or FED. R. CIV. P.. 56. Because at issue in a factual motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Id. at 730 (quoting *Mortensen,* 549 F.2d at 891). The *Osborn* court stated that the proper course is for the defendant to request an evidentiary hearing on the issue, and, since no statute or rule prescribes the format of such a hearing, "'any rational mode of inquiry will

do.'" *Id.* (quoting *Crawford,* 796 F.2d at 929).

> Once the evidence is submitted, the district court must decide the jurisdictional issue, not simply rule that there is or is not enough evidence to have a trial on the issue. [*Crawford,* 796 F.2d at 929.] The only exception is in instances when the jurisdictional issue is "so bound up with the merits that a full trial on the merits may be necessary to resolve the issue." *Id.*

Id.

Although the district court has the authority to consider matters outside the pleadings on a motion challenging subject matter jurisdiction under FED. R. CIV. P.. 12(b)(1), *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 470 (8th Cir. 1993), and Midland has submitted matters outside of the pleadings, the court finds that Midland makes a facial challenge to subject matter jurisdiction over the PURPA claims here, rather than mounting a factual challenge to the truthfulness of its averments. *See Titus*, 4 F.3d at 593 (distinguishing between facial and factual challenges to subject matter jurisdiction). Specifically, Midland asserts that the PURPA simply does not provide for a federal cause of action asserted in the plaintiffs' claims. Therefore, the court will restrict itself to the face of the pleadings, and afford the non-moving party, the plaintiffs, the same protections they would receive defending against a motion brought under Rule 12(b)(6). *Osborn,* 918 F.2d at 729 n. 6.

B. Overview of The Public Utility Regulatory Policies Act ("PURPA")

Under the Federal Power Act, 16 U.S.C. § 791a *et seq.*, any entity that owns or operates facilities used to transmit or sell electric energy in interstate commerce is subject to the jurisdiction and the regulatory powers of the Federal Energy Regulatory Commission ("FERC"). *See* 16 U.S.C. § 824. In 1978, as part of a package of legislation designed to combat the nationwide energy crisis, Congress passed the Public Utility Regulatory Policies

Act ("PURPA").[3] *FERC v. Mississippi*, 456 U.S. 742, 742 (1982). In enacting PURPA, "Congress' overall strategy was to 'control power generation costs and ensure long-term economic growth by reducing the nation's reliance on oil and gas and increasing the use of more abundant, domestically produced fuels.'" *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 132 (3d Cir. 1998) (citing *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of the State of New Jersey*, 44 F.3d 1178, 1182 (3d Cir. 1995)). Section 210 of PURPA seeks to encourage the development of cogeneration facilities and small power production facilities. *American Paper Inst. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 404 (1983). Prior to the enactment of the PURPA, Congress identified two problems that thwarted the development of non-traditional generational facilities: (1) traditional electric utilities were reluctant to purchase power from, and sell power to nontraditional electric generation facilities; and (2) regulation of non-traditional facilities by state and federal utility authorities imposed undue financial burdens on the non-traditional facilities, thereby discouraging their development. *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of the State of New Jersey*, 44 F.3d 1178, 1183 (3d Cir. 1995) (citing *FERC*, 456 U.S. at 750-51); *Bristol Energy Corp. v. New Hampshire Public Utilities Comm'n*, 13 F.3d 471, 473 (1st Cir. 1994); *New York State Elec. & Gas Corp. v. Saranac Power Partners, L.P.*, 117 F. Supp. 2d 211, 215 n.3 (N.D.N.Y. 2000); *Greensboro Lumbar Co. Georgia Power Co.*, 643 F. Supp. 1345, 1372 (N.D. Ga. 1986), *aff'd*, 844 F.2d 1538 (11th Cir. 1988).

In an effort to surmount the first problem, the PURPA requires electric utilities to

[3]The legislation package also included the Energy Tax Act of 1978, Pub. L. 95-618, 92 Stat. 3174; the National Energy Conservation Policy Act, Pub. L. 95-619, 92 Stat. 3206; the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289; and the Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3351. *See FERC v Mississippi*, 456 U.S. 742, 745 n.2 (1982).

purchase electric energy from independent power producers operating so-called "qualifying cogeneration facilities" ("QFs").[4] *See* 16 U.S.C. § 824a-3. Congress directed the FERC to promulgate rules and regulations governing the terms of such purchases and sales. *See* 16 U.S.C. § 824a-3(f). In an effort to surmount the second problem, the PURPA requires the FERC to implement regulations exempting QFs from federal regulation to which traditional electric utilities are subject, including most provisions of the Federal Power Act and "[s]tate laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities." 16 U.S.C. § 824a-3(e)(1).

Congress was also concerned about limiting the cost of electricity to consumers. The PURPA, therefore, provides that no rule requiring a utility to purchase energy from a QF "shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b). "Incremental cost of alternative electric energy," which is commonly referred to as the utility's "avoided cost," is defined as "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d), 18 C.F.R. § 292.101(b)(6). In accordance with these provisions, the FERC promulgated regulations governing the transactions between utilities and QFs. In this case, the specific FERC rules that the plaintiffs claim the defendants have violated are set forth at 18 C.F.R. § § 292.304, 292.305, and 292.306. Plaintiffs identify the salient parts of each of these regulations that are applicable to their

[4] A "cogeneration facility" is one that produces both electric energy and steam or some other form of useful thermal energy, such as heat. 16 U.S.C. § 796(18)(A). A "small power production facility" is one that has a production capacity of no more than 80 megawatts and uses primarily biomass, waste, or renewable resources (such as wind, water, or solar energy) to produce electric power. *Id.* § 796(17)(A). "Qualifying facilities" are cogeneration and small power production facilities meeting the requirements of 18 C.F.R. § § 292.201 through 292.207.

claims here, to wit: 18 C.F.R. § 292.304 which requires electric utilities to purchase excess capacity from a qualifying facility at a rate equal to the utility's avoided costs; 18 C.F.R. § 292.305 which requires an electric utility to sell electric power to a qualifying facility at rates that are just and reasonable and in the public interest, and which do not discriminate against the qualifying facility in comparison to rates for sales to other customers served by the electric utility; and 18 C.F.R. 292.306 which prohibits an electric utility from charging a qualifying facility for interconnection costs on a discriminatory basis with respect to other customers with similar load characteristics.

The PURPA also contains a detailed enforcement scheme and provisions for judicial review. *See* 16 U.S.C. § 824a-3(g)- (h); *see also New York State Elec. & Gas Co.*, 117 F. Supp. 2d at 216. Section 210(g) provides for state court review of state regulatory authorities' orders implementing PURPA, and state court actions to enforce requirements of state regulatory authorities. *See* 16 U.S.C. § 824a-3(g)(1)-(2). Section 210(h)(1) provides that for enforcement purposes, rules and regulations promulgated pursuant to PURPA shall be treated like the Federal Power Act ("FPA") rules, *see* 16 U.S.C. § 824a-3(h)(1), which are enforceable by FERC in federal district court. *See* 16 U.S.C. § 825m. Section 210(h)(2)(A) of PURPA provides that FERC may bring an enforcement action against a state regulatory agency or nonregulated electric utility in district court, and section 210(h)(2)(B) allows a utility, qualifying cogenerator or qualifying small power producer to petition FERC to enforce section 210(f), which governs state regulatory authorities' and nonregulated electric utility's responsibilities to implement PURPA rules and regulations. *See* 16 U.S.C. § 824a-3(h)(2)(A) and (B).[5] If FERC declines to bring

[5]Specifically, 16 U.S.C. § 824a-3(h)(2)(A) and (B) provide:

(2)(A) The Commission may enforce the requirements of subsection (f) of this section against any State regulatory authority or nonregulated electric utility. . . .

(continued...)

such an enforcement action within sixty days following the date on which the petition is filed, the utility, qualifying cogenerator or qualifying small power producer can commence its own enforcement action against the state regulatory authority or nonregulated electric utility in district court. *See id*.

C. Jurisdiction Under the PURPA

Based on the statutory excerpts delineated above, the United States district courts have limited jurisdiction over plaintiffs' claims to enforce the requirements of rules promulgated by the FERC under PURPA. *See Bristol Energy Corp.*, 13 F.3d at 474 (stating that "[s]ection 824a-3(g) places limits on federal jurisdiction in proceedings involving rules implementing 16 U.S.C. § § 824a-3(a) and 824a-3(f)"); *see also Greensboro Lumber Co.*, 643 F. Supp. at 1372 (citing 16 U.S.C. § 824a-3(f), (g), and (h)) (stating that Congress provided for "the enforcement of these obligations pursuant to a set of comprehensive and complicated statutory provisions that limit federal jurisdiction."); *Massachusetts Inst. of Tech. v. Massachusetts Dep't of Public Utilities*, 941 F. Supp. 233, 236 (D. Mass. 1996). Cases confronting questions of jurisdiction under § 210 (g) and (h) have earmarked a distinction between claims challenging the implementation of FERC/state agency/nonregulated utility regulations and claims challenging the application of such

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[5](...continued)

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. . . . Section 210(f), which is referenced in Section 210(h)(2), requires the state regulatory authority to make rules implementing the FERC's rules for regulated utilities in that state. *See* 16 U.S.C. § 824a-3(f).

regulations. *See Massachusetts Inst. of Tech.*, 941 F. Supp. at 236-37; *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1236 (D.C. Cir. 1995); *Greensboro Lumber Co.*, 643 F. Supp. at 1373-74. An implementation claim involves a contention that the state agency or nonregulated utility has failed to implement a lawful implementation plan under § 824a-3(f) of the PURPA, *see Massachusetts Inst. of Tech.*, 941 F. Supp. at 237, whereas an "as-applied" claim involves a contention that the state agency's or nonregulated utility's implementation plan is unlawful, as it applies to or affects an individual petitioner. *Id.*; *see also Greensboro Lumber Co.*, 643 F. Supp. at 1374. The two federal district courts that have addressed this issue have refused to hear "as-applied" claims. *Id.*

In *Greensboro Lumber Co. Georgia Power Co.*, 643 F. Supp. 1345, 1372 (N.D. Ga. 1986), *aff'd*, 844 F.2d 1538 (11th Cir. 1988), the qualifying facility ("QF") challenged the defendant's implementation plan, contending that the rates established by the plan were not "non-discriminatory, just and reasonable" as required by 18 C.F.R. § 292.305. The district court concluded that such a claim was properly regarded as a challenge to the application of an implemented plan, and not a challenge to the implementation of the plan itself. *Greensboro Lumber Co.*, 643 F. Supp. at 1374-75. Therefore, the district court held that section 210(g) divested it of jurisdiction over a QF's "as-applied" claim that a nonregulated utility failed to adhere to its own implementation plan in its dealings with the QF. *Greensboro Lumber Co.*, 643 F. Supp. at 1374. Specifically, the district court explained:

> This Court lacks subject matter jurisdiction over these "as-applied" claims. *See* 16 U.S.C. § 824a-3(g), section 210(g) of PURPA. In general, section 210(h)(2)(B) of PURPA limits federal court jurisdiction to claims that nonregulated utilities such as [the defendants] have failed to comply with their obligation under § 210(f)(2) of PURPA to devise an implementation plan, after notice and opportunity for public hearing, that is consistent on its face with FERC's regulations. Any subsequent claim that a nonregulated utility has failed to adhere to its own implementation plan in its dealings with a

> particular qualifying facility must be bought [sic] in state court, which has exclusive jurisdiction "to enforce any requirement" of a nonregulated utility's implementation plan. 16 U.S.C. § 824a-3(g)(2) (incorporating 16 U.S.C. § 2633 by reference).

Id. On appeal, the Eleventh Circuit Court of Appeals affirmed the district court's decision, stating that "[t]the district court held that is lacked subject matter jurisdiction over Greensboro's "as-applied" claim, and we find its reasoning persuasive." *Greensboro Lumber Co. v. Georgia Power Co.*, 844 F.2d 1538, 1542 (11th Cir. 1988).

Similarly, in *Massachusetts Inst. of Tech. v. Massachusetts Dep't of Public Utilities*, 941 F. Supp. 233 (D. Mass. 1996), a federal district court, following the reasoning espoused by the district court in *Greensboro Lumber Co.*, ruled that it had no jurisdiction to hear a complaint brought by a QF concerning stranded-cost recovery charges proposed by an electric utility and approved by the Massachusetts Department of Public Utilities ("DPU"). The developer of the QF, Massachusetts Institute of Technology ("MIT") argued that the DPU violated the PURPA, specifically 18 C.F.R. § 292.305, when it approved a "customer transition charge ("CTC")" so that Cambridge Electric Light Co. (MIT's current supplier of electric power) could recover costs stranded when a customer discontinued all or part of its existing all-requirements service. The federal court explained that it had jurisdiction to force the state to implement QF regulations under the PURPA, but not to settle disputes about how state-approved rate or regulation might apply to an individual QF. Specifically, the district court stated that MIT's claim "is that the CTC, as applied to MIT, violates PURPA." *Id*. at 238. Consequently, the district court granted the defendants' motions to dismiss. *Id*.

In this case, the plaintiffs contend that the tariffs imposed by the defendants violate the PURPA, specifically the regulations that implement the PURPA, to wit: 18 C.F.R. § § 292.304, 292.305, and 292.306. Relying on the rationale espoused in *Greensboro Lumber Co.*, which the Eleventh Circuit Court of Appeals found to be "persuasive," and in

the absence of any Eighth Circuit precedent, the court finds that plaintiffs' claims are properly characterized as "as-applied" claims. This is so because plaintiffs contend that the defendants' tariffs, as they apply to them, violate PURPA. They do not contend that the defendants have failed to implement a lawful implementation plan. The court makes this finding based on the face of plaintiffs' complaint, and also on the statements asserted by plaintiffs in their resistance to Midland's motion to dismiss. Plaintiffs explicitly state that the present action is not an action to enforce PURPA and that it in "no way seeks to require the Defendants to comply with PURPA"; rather, plaintiffs insist that this is an action for damages, alleging as one of the predicate acts causing such damages a violation of the PURPA. *See* Plaintiffs' Brief at 2. These statements clearly support the court's characterization of plaintiffs' claims as "as-applied" versus implementation claims. Thus, plaintiffs' assertion that this court has federal question jurisdiction because "aspects of [their] claims depend on a determination of whether [the] PURPA was violated by the defendants" is unassailable. Indeed, because plaintiffs' claims are "as-applied" and are not implementation claims, even by the plaintiffs' own admission, this court does not have jurisdiction over these claims. *See* 16 U.S.C. 824a-3(g); *see also Greensboro Lumber Co.*, 643 F. Supp. at 1374; *Massachusetts Inst. of Tech.*, 941 F. Supp. at 238.

Furthermore, in the Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the PURPA, *see* 48 FR 29475, the FERC provides the following examples of causes of action which might arise under § 824a-3(g)(2) of the PURPA, and, relevant to the inquiry here, the proper forums in which to bring such causes of action:

> Assume that a State regulatory authority has promulgated regulations under section 210(f) of PURPA which require electric utilities and qualifying facilities to negotiate a rate for purchase. The underlying State-established regulation is not at issue but, rather, a qualifying facility alleges that a particular electric utility, subject to the State regulatory authority's jurisdiction, refuses to negotiate. This allegation involves the

> application of a State-established rule and would properly lie before a State judicial forum of competent jurisdiction.
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> Similarly, where a nonregulated electric utility has promulgated rules appropriately implementing this Commission's regulations, and a qualifying facility alleges that a contract offered to it by the nonregulated utility contains unreasonable interconnection requirements, for example, this allegation is one which is properly raised under section 210(g)(2) before a State judicial forum, and not before this Commission.

48 FR 29475, *29476. Admittedly, while these causes of action discussed above are different than the cause of action asserted by the plaintiffs in this case, they nonetheless lend support to the caselaw discussed above, and this court's conclusion, that "as-applied" claims are properly raised before a State judicial forum.[6]

Plaintiffs also assert that this court has jurisdiction over its PURPA claims under 16 U.S.C. § 824a-3(h)(2)(B). This section provides that, a district court, upon petition of an "electric utility, qualifying cogenerator, or qualifying small power producer," may "require [a] State regulatory authority or nonregulated electric utility to comply with" the requirements of subsection (f) of section 210 of PURPA. 16 U.S.C. § 824a-3(h). The district court is vested with this enforcement authority only if, after sixty days, FERC declines to bring an enforcement action against a noncomplying state regulatory authority or nonregulated utility. *Id*. First, the court notes that whether or not the plaintiffs have met

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[6] "The Commission's regulations allow the States and nonregulated utilities a wide degree of latitude in establishing an implementation plan. Such latitude is necessary in order for implementation to accommodate local conditions and concerns, so long as the final plan is consistent with statutory requirements.

With regard to review and enforcement, the Commission's role is generally limited to ensuring that the State regulatory authority—or nonregulated electric utility—established implementation plan is consistent with section 210 of PURPA and with the Commission's regulations. Once this is ensured, the State judicial forums are available to ensure that electric utilities and qualifying facilities are dealing in good faith and in a manner consistent with locally-established regulation. 48 FR 29475, 29477.

this particular jurisdictional requirement is unknown. This is so because despite asserting that this court has jurisdiction over this action pursuant to 16 U.S.C. § 824a(h)(2)(B), the plaintiffs fail to indicate, either in their complaint or in their resistance to Midland's motion to dismiss, whether or not they petitioned the FERC to bring an enforcement action against the defendants. Consequently, because this court does not know whether or not the plaintiffs ever provided the FERC with the statutorily required sixty days in which to decline to bring an enforcement action against the defendants, the court is uncertain as to whether it is vested with the enforcement authority outlined in 16 U.S.C. § 824a-3(h)(2)(B). Notwithstanding, the plaintiffs do not allege that the defendants failed to meet the requirements established in that subsection. As indicated earlier, § 824a-3(h)(2)(B) allows a utility, qualifying cogenerator or qualifying small power producer to petition FERC to enforce § 824a-3(f), which governs state regulatory authorities' and nonregulated electric utility's responsibilities to implement PURPA rules and regulations. *See* 16 U.S.C. § 824a-3(h)(2)(B) (emphasis added). In their resistance, however, plaintiffs make it abundantly clear that they do not allege that any of the defendants failed to meet the requirements established in 16 U.S.C. § 824a-3(f). In fact, plaintiffs decisively state that this is not an action to enforce PURPA. Therefore, the jurisdictional grant outlined in 16 U.S.C. § 824a-3(h)(2)(B) is wholly inapplicable to their claims, and accordingly, it does not vest this court with jurisdiction.

III. CONCLUSION

Based on a review of the caselaw and the FERC's position regarding the enforcement of section 210 of the PURPA, the court concludes that the plaintiffs' claims against Midland and Iowa Lakes are properly characterized as "as-applied" claims and, therefore, for the reasons stated above, this court is not vested with jurisdiction. Accordingly, defendant Midland's Motion to Dismiss for lack of subject matter jurisdiction is **granted.** Plaintiffs'

claims against defendants Midland and Iowa Lakes are hereby **dismissed with prejudice**. Furthermore, the court declines to exercise supplemental jurisdiction over plaintiffs' remaining state law claims.

IT IS SO ORDERED.

DATED this 5th day of March, 2001.

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MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA